IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION No. 1699 OF 2019

M/s. MEP RGSL Toll Bridge Pvt. Ltd. … Petitioner

Versus

1. Maharashtra State Road Development Corporation Ltd.
2. The Vice Chairman & Managing Director, Maharashtra State Road Development Corporation Ltd.
3. The Principal Secretary, Law and Judiciary Department.
4. The Chairman, Niti Aayog.
5. The Director, Mumbai Centre for International Arbitration. ...Respondents.

with

WRIT PETITION NO. 2337 OF 2019

Raima Toll & Infrastructure Pvt. Ltd. … Petitioner

Versus

1.Maharashtra State Road Development Corporation Ltd.
2. The Vice Chairman & Managing Director, Maharashtra State Road Development Corporation Ltd.
3. The Principal Secretary, Law and Judiciary Department.
4. The Chairman, Niti Aayog.
5. The Director, Mumbai Centre for International Arbitration. ...Respondents.

Dr. Abhishek M. Sanghvi, Senior Advocate & Mr. Sachin Datta, Senior Advocate a/w. Mr. Rajiv Dvivedi, Mr. Azeem Samual Mr. Shyamsundar Solanke i/b. PNP & Associates, for the petitioner in both the Petitions.

Dr. Milind Sathe, Senior Advocate a/w. Mr. Arun Siwach, Mr. Vinamra Kopariha, Ms. Prachi Vasudeo i/b. Cyril Amarchand Mangaldas for respondent nos. 1 and 2.

Mr. Laxmikant Satelkar, AGP for respondent no. 3/State.

.....

CORAM : DIPANKAR DATTA CJ &
G.S.KULKARNI, J.

Reserved on : October 9, 2020

Pronounced on : November 06, 2020

JUDGMENT (PER G.S.KULKARNI,J.):

1. These are two petitions invoking the jurisdiction of this Court under Article 226 of the Constitution of India. The first petition is by M/s.MEP RGSL Toll Bridge Pvt. Ltd. (for short "**MEPRGSL**"), the second petition is by Raima Toll & Infrastructure Pvt. Ltd. (for short **"Raima"**). Both the petitioners (collectively referred as "**petitioners**") are stated to be 'Special Purpose Vehicles' of one 'MEP Infrastructure Developers Limited'. The petitioners were beneficiaries of 'toll

contracts' awarded by respondent no.1-Maharashtra State Road Development Corporation Limited (for short "**MSRDC**"), which were at different locations and for different periods. The contract period in regard to both these contracts, has long expired. There is no relation between these two contracts, however as the cause of action being common, these petitions are tagged together.

2. On the above prefatory lines, we note that the prayers as made by the petitioners are quite peculiar, which are *inter alia* of a nature, that the MSRDC, be directed by a writ of this Court, to provide for an *'arbitration'* qua these toll collection contracts entered by the MSRDC with the petitioners. There is also a somewhat incongruous prayer in the first petition, namely for a declaration that Clause 36 of the agreement dated 29 January 2014 entered between the MSRDC and the petitioner, is itself in the nature of an arbitration agreement. It would be appropriate to note the prayers in both the petitions which read thus:

> **In Writ Petition no.1699 of 2019**
>
> (a) Issue a writ in the nature of mandamus to Respondent No.1 and 2 to act in consonance with Notification No. Shashan Nirnay 2016/P.K.20/KA-19 dated 13.10.2016 and thereby take necessary steps to provide for a dispute resolution mechanism through Arbitration under the auspices of an Arbitration Institute (such as the Respondent No.5 institute) duly

recognized by the Govt. of Maharashtra;

(b) Declare and direct the Clause 36 of the Agreement dated 29/01/2014 between the Petitioner and Respondent No.1 is itself in the nature of arbitration agreement;

In Writ Petition No.2337 of 2019

(A) That this Hon'ble Court be pleased to issue an appropriate writ order and direction directing the Respondent No.1 and 2 follow, observe and obey the policy guidelines as well as directors of the central government as well as the state government (as detailed and annexed in the writ petition) and take a fresh decision on the offer of the petitioner to go for an arbitration for redressal of the grievances.

(B) That this Hon'ble Court be pleased to issue an appropriate writ order and directions directing the Respondent No.1 and 2 to follow the same procedure of alternative dispute redressal that they have adopted in Clause No.63 (Vol-III) of the Project Implementation & Securitization of toll at Five Mumbai Entry Points along with maintenance of flyover & Allied Structure.

3. The factual conspectus in the first petition filed by MEPRGSL, would briefly be thus:

Respondent no.1-MSRDC is a corporation established and fully owned by the Government of Maharashtra. It was incorporated as a limited company under the Companies Act,1956 on 2 August 1996. Some of the major functions of the MSRDC are to promote and operate road projects, to plan, investigate, design, construct and manage, identified road projects and their area development, to invite tenders, bids, offers and enter into contracts for the purposes of all the activities

of the corporation, to undertake schemes or works, either jointly with other corporate bodies or institutions, or with Government or local authorities, or on agency basis, to undertake any other project and other activities entrusted by the State Government.

4. The State Government is impleaded as respondent no.3, as it is the petitioners case that the State Government by its notification dated 13 October 2016 has *inter alia* provided for an "Institutional Arbitration Policy", as a preferred mode of dispute resolution in respect of Government contracts. The petitioner contends that respondent no.5-'*Mumbai Centre for International Arbitration*' is an arbitration centre, recognized by the State Government, under the said policy notification, which provides for a platform for institutional arbitration, for adjudication of contractual disputes in which the State Government/ its instrumentalities are parties.

5. The MSRDC in or about 2013 invited bids for appointment of a contractor for operation and maintenance of 'Rajiv Gandhi Sea Link Project & Toll Plaza & Collection of Toll' on Upfront basis. The contract work *inter alia* consisted of collection of toll, from the notified vehicles crossing the toll plaza, at the prescribed rate and making payment of

upfront amount in installments to the MSRDC. The contract period was to be of 156 weeks commencing from 6 February 2014 and to end on 1 February 2017.

6. Several parties including the parent company of the petitioner-MEPIDPL participated in the said tender issued by the MSRDC. The highest bidder was to be awarded the tender for toll collection. MEPIDPL's bid was the highest bid, of an amount of Rs.227.70 crores, for the contract period 156 weeks (three years). In pursuance thereto the MSRDC addressed a negotiation letter dated 22 November 2013 to the MEPIDPL to submit a revised offer. The MSRDC's letter was responded by MEPIDPL on 5 December 2013 whereby it agreed to pay Rs.50 lakhs as upfront payment over and above the financial offer as quoted. The MSRDC accepted this revised offer and issued a letter of acceptance dated 10 January 2014 to the MEPIDPL for a contract period of 156 weeks (6 February 2014 to 1 February 2017). On 13 January 2014 the MEPIDPL sought approval for a contract to be entered with the petitioner, being a Special Purpose Vehicle (SPV) created for the said contract. On 17 January 2014 the MSRDC granted its approval to the SPV proposal.

7. Accordingly, on 29 January 2014 an agreement came to be entered between the MSRDC and the petitioner, under which the petitioner was appointed as a contractor for operation and maintenance of this toll project. It is a tripartite agreement between MSRDC, parent company of the petitioner and the petitioner.

8. In paragraph 3(k) of the petition the petitioner has stated that Clause 36.a of the said agreement is a clause which is akin to an arbitration clause. It would be apposite to note the petitioner's averments as extracted below:-

> "3(k) That Contract between the parties contains a clause which is akin to an Arbitration Clause. The said Clause is reproduced hereunder.
>
> 36.a **DISPUTES RESOLUTION**: "In case of disputes or difference of opinion arising, the decision of the Vice Chairman and Managing Director shall be final and binding on the Contractor. The Contractor shall be given reasonable opportunity to represent his case before the Vice Chairman and Managing Director."
>
> The aforesaid clause is in the nature of an arbitration clause as elaborated hereinbelow.
>
> 1. That the following are the vital ingredients of the clause:
>
> i. All questions and disputes in any way arising out of or relating to the agreement are within the ambit of clause.
>
> ii. The clause contemplates that an opportunity of hearing will be given.
>
> iii. The clause expressly affords an opportunity to adduce

> evidence.
>
> Iii. The clause mandates that the decision will be given in writing.
>
> v. The said decision shall be final and binding on the Contractor."
>
> (emphasis supplied)

9. In paragraph 3(m) of the petition, the petitioner has contended that Clause 36.a (supra) of the agreement also satisfies the test of an arbitration clause as laid down in the decision of the Supreme Court in ***Jagdish Chander Vs. Ramesh Chander & Ors.***[1]. In paragraph 3(n) referring to the decisions of the different High Courts, the petitioner contends that Clause 36a would be required to be recognized as an arbitration clause. The averments in paragraph 3(n) of the petition are also required to be noted which read thus:-

> "3(n). That several High Courts have rendered innumerable judgments where dispute resolution clauses akin to Clause 36a.0 in the present case have been held to be in the nature of an Arbitration Agreement. This has been done by Delhi High Court by giving pragmatic interpretation to the concerned clauses even if the word "arbitration" is not used in the relevant clauses and even if the clause does not indicate as to whether the adjudicating authority is to act in a judicial and impartial manner and / or take a decision after hearing both the parties and permitting both the parties to adduce the evidence."

10. Further case of the petitioner is that even if there is a lacuna in the arbitration clause (clause 36a), the Court would interpret

1 (2007)5 SCC 719

the same so as to fill in the necessary gap. The petitioner also contends that even assuming that Clause 36.a is not in the nature of the arbitration agreement, however, in terms of the policy decision as taken by the State of Maharashtra as contained in the notification dated 13 October 2016, the existing contract would be required to be suitably amended/altered so as to provide, that the disputes be referred to arbitration, under the auspices of a recognized arbitral institute namely the respondent no.5-Mumbai Centre for International Arbitration. This according to the petitioner would be mandatory for the MSRDC, in terms of the prevalent policy. It is contended that it is illegal and arbitrary to disregard the scope, purport and intent of the State policy and deny the remedy of arbitration to the petitioner.

11. The petitioner next contends that the State's arbitration policy is impliedly recognized in an earlier agreement (which is prior to the policy notification) entered between the petitioner's parent company and the MSRDC, under which the nature of the work was similar, namely toll collection, in respect of the five Mumbai entry points. This contract was awarded by the MSRDC for the period between 20 November 2010 to 19 November 2026 (ie; for a period of 16 years) under which, an arbitration agreement was provided in

Clause 63 to refer the disputes which may arise between the parties, for adjudication in an arbitration of a sole arbitrator.

12. It is thus the petitioner's case that now by virtue of the State Government's notification dated 13 October 2016, the State Government has declared it to be its policy, that every Government contract which is more than Rs.5 crores shall mandatorily provide for an arbitration clause. It is stated that by a further notification dated 4 March 2017, respondent no.5-Mumbai Centre for International Arbitration, also came to be designated and recognized as an 'Institutional Arbitration Centre,' wherein all arbitrations involving the State/its Undertakings would be conducted. The petitioner in this context makes a reference to an order dated 23 January 2018 of the learned Single Judge of this Court in ***Arbitration Application No.161 of 2017*** (***R.J.Shah & Co.Ltd. Vs. State of Maharashtra***) where the parties agree in proceedings of Section 11 of the A&C Act, that the disputes be referred for adjudication to the MCIA.

13. The petitioner contends that not only the State Government but also the Union of India has taken an initiative to promote arbitration as an alternative dispute redressal mechanism vide OM

No.14070/14/2016-PPPAU dated 5 September 2016, issued by the "NITI AAYOG", which was in pursuance of a decision taken by the 'Cabinet Committee on Economic Affairs' on 31 August 2016.

14. Although such fervent plea is made that an arbitration be provided under the agreement in question, it is fairly conceded on behalf of the petitioner that the petitioner *per se* does not have any claim against the MSRDC, although the contract had come to an end on 1 February 2017. The petitioner's case however is, that the MSRDC by its letter dated 26 February 2018 had called upon the petitioner to pay Rs.16.86 crores as the petitioner's revenue share as per Article 22, Clause no.22.12 (Volume II) of the contract. This based on the difference in the traffic count reported by the contractor/petitioner and the traffic count undertaken by MSRDC independently. It is stated that correspondence ensued between the parties on this issue and as there was disagreement on the accuracy of the traffic data, as per the dispute resolution clause, as contained in the agreement, a committee comprising of the Legal, Accounts and Engineering Division was formed on 18 September 2018. This committee did not accept the objections of the petitioner. The petitioner was then called upon to pay the revenue share as demanded by the MSRDC. The petitioner contends that the

order passed by the said committee is cryptic and a non-speaking order.

15. The petitioner, hence, by its letter dated 18 December 2018, called upon the MSRDC to refer the disputes between the parties to arbitration by invoking the arbitration policy of the State Government as contained in the notification dated 13 October 2016. The MSRDC however, by its letter dated 17 January 2019 refused the petitioner's request to have a reference to arbitration recording that there was no arbitration clause specified, in the contract agreement. The said letter reads thus:-

> "No.MSRDC/19.JMD(II)/TMU/2019/73
>
> Date : 17.01.2019
>
> To,
> The Director
> M/s. MEP RGSL Toll Bridge Pvt. Ltd.,
> 410, Boomerang, Chandivali Farm Road,
> Near Chandivali Studio, Andheri (E),
> Mumbai – 400 072.
>
> Sub : Operation & Maintenance of RGSL & Toll Plaza & Collection of Toll on upfront basis.
>
> Regarding outstanding towards Toll Revenue Share.
>
> Ref:1. MSRDC's order No.MSRDC/02/JMD(II)/2018/TMU/960, dated 18/09/2018.
> 2. Your letter No. MEPRTBPL/OUT/2018-19/1388, date 15/12/2018.
>
> Vide MSRDC's letter dated 26/02/2018, MSRDC had intimated you regarding remitting amount of outstanding revenue share to MSRDC. Against the letter, you had requested

> hearing before VC&MD, MSRDC and the hearing has taken place on 08/03/2018 and the order of the hearing is issued vide letter / order as per reference no.1 above.
>
> Vide the order, you were also instructed to remit the outstanding towards revenue share immediately. But, you have requested for an Arbitration in this matter vide your request letter dated 15/12/2018. **However, there is no Arbitration Clause specified in the Contract Agreement.**
>
> Hence, you are once again requested to pay the revenue share immediately.
>
> (Shashikant Sontakke)
> Chief Engineer (TMU)
> M.S.R.D.C. (Ltd.) Mumbai"
>
> **(emphasis supplied)**

16. On the above conspectus, the petitioner has filed this petition praying for reliefs as noted above, *inter alia* contending that the MSRDC is expected to follow and obey the policy decision of the State Government to refer disputes to arbitration. It is contended that the nature of the dispute between the parties regarding revenue sharing qua the traffic figures is technical, hence, it is imperative for the MSRDC to agree for an arbitration. The petitioner contends that such policy is also encouraged by the Courts.

17. The petitioner hence contends that this is a fit case where a writ of mandamus ought to be issued by this Court directing the MSRDC to act in consonance with the State Government Notification

dated 13 October 2016 and take necessary steps to provide for arbitration between the parties. The second relief is also that this Court declares clause 36 of the agreement as an arbitration agreement.

Writ Petition of Raima Toll & Infrastructure Pvt.Ltd.

18. Similar to the petitioner's case in the first petition, the petitioner in this case was also a beneficiary of a toll contract awarded by the MSRDC for the "Kini and Tasawade Toll Plaza on National Highway no.4 -Maharashtra". The agreement between the parties was entered on 5 September 2014. The contract period was from 29 May 2014 to 25 May 2016 which came to be extended upto 22 August 2016 when the contractual period came to an end. It is not in dispute that after completion of the contract period, the toll plazas were handed over to the new contractor appointed by the MSRDC.

19. The petitioner in paragraph 2(k) has stated that the provision for resolution of disputes was made under clause 39 of the offer document being part of the agreement, under which the disputes which would arise between the parties, were to be resolved by the Vice Chairman and Managing Director. The petitioner has stated that the agreement does not provide for an arbitration to resolve the disputes

between the parties. In paragraphs 3(k) and 3(l) of the petition following averments are made :-

> 3k. That the provision for resolution of the dispute has been provided in Clause 39 of the offer document.
> 39.0 DISPUTES AND RESOLUTION: "In case of disputes or difference of opinion arising, the decision of the Vice Chairman and Managing Director shall be final and binding on the Contractor. The Contractor shall be given reasonable opportunity to represent his case before the Vice Chairman and Managing Director."
>
> 3l. That it is evident from the above that arbitration was not provided as a means for resolution of disputes by the Respondent No.1 and in the above set of offer document."

20. It is the petitioner's case that MSRDC carried out a traffic survey in April 2015 and in January 2016, for which a consultant came to be appointed. The survey was for the purpose of revenue sharing between the parties as contained in clause 28.4 of the contract agreement which *inter alia* provided that the toll revenue, more than what is projected by the contractor, as per the cash flow submitted by him shall be shared with the MSRDC in the ratio 90:10, from the date of commencement of the contract. The income was required to be calculated on the basis of the actual traffic count. The petitioner states that based on the traffic count survey report, MSRDC by its letter dated 22 August 2016 called upon the petitioner to remit the revenue share of Rs.33,53,69,108/- to the MSRDC. On receipt of this letter from the MSRDC, the petitioner requested the MSRDC to furnish a detailed

working of the revenue share calculation, which came to be provided by the MSRDC by letter dated 21 September 2016. The petitioner submitted to the MSRDC a counter working of the revenue share of Rs.1.39 crores, thereby denying the revenue share of Rs.33.53 crores. A consultant-M/s. Darashaw & Company Pvt. Ltd. came to be appointed by MSRDC who calculated the revised revenue share of Rs.58.76 crores. As the parties were not ad-idem on the revenue sharing a committee comprising of the Legal, Accounts and Engineering Division, was formed by the MSRDC to examine the issue of revenue sharing. The committee did not accept the petitioner's contention on revenue sharing, and by a communication dated 18 September 2018 called upon the petitioner to pay the MSRDC, the amount of revenue sharing as communicated, alongwith interest. Similar to the case of the petitioner in the first petition, the petitioner by its letter dated 15 December 2018 addressed to MSRDC, recorded that although there was no arbitration clause either in the agreement, however as per the policy of the State Government as contained in the notification dated 13 October 2016, the dispute on revenue sharing be referred to arbitration. The MSRDC, however, rejected the petitioner's request by its letter dated 17 January 2019 which is almost in similar terms as in the first case, *inter alia* recording that there is no arbitration clause specified in the contract

agreement. The petitioner has raised similar contentions as in the first petition and has prayed that a writ of this Court be issued to the MSRDC to provide for arbitration as per the prayers as noted above.

21. These petitions were heard by a co-ordinate Bench of this Court on 18 September 2020, when an adjournment came to be granted to the petitioner to enable the petitioner to file an additional affidavit, to explain as to whether cause of action subsisted for these petitions to be maintainable. In pursuance of the said order Shri.Shashwat Singh, the common authorised signatory of the petitioners has placed on record an affidavit dated 25 September 2020 in both these petitions. In his affidavit in the first petition Mr. Shashwat Singh reiterates that Clause 36.a (supra) is in the nature of an arbitration agreement. He says that although the contract period is over, the said clause is required to be recognized as an independent clause which would survive despite the agreement having come to an end. The following averments in paragraphs **2(h) and 2(i)** are relevant:-

> "2h. That it is a settled position of law that the dispute resolution clause or the arbitration clause of any agreement, survives even when the original contract period has come to an end, or terminated or rescinded or is nullity as being void ab initio. The dispute resolution clause is an independent agreement within the entire framework of agreement, and it survives on its own, irrespective of the life of the remaining agreement. This has been held in catena of judgments, which

> shall be demonstrated at the time of hearing.
>
> i. The fact is that this provision of dispute resolution is still surviving. Therefore, the Respondent is duty bound to apply the Policy decision on the dispute resolution clause."

The petitioner therefore contends that the cause of action to pursue the petition survives.

22. The plea of the petitioner in the second petition is not different. In paragraph 2(e) of the additional affidavit it is contended that the dispute between the parties existed, when the State Government issued the policy notification dated 13 October 2016. It is contended that it would be the obligation of the MSRDC to refer the disputes to arbitration. Paragraphs **2(e) and 2(j)** of the affidavit of Mr.Shashwat Singh read thus:-

> "2(e) That the original Contract period was from 29.05.2014 to 25.05.2016 and thereafter extended upto 22.08.2016. After completion of the term, the Toll Plazas were handed over to MSRDC appointed Contractor on 22.08.2018. Therefore till 22/08/2018 the Petitioner was running the Toll Plaza. The contract was very much alive on the date the Policy decision was taken on 13/10/2016, when a direction was given to the State of Maharashtra and its agencies and bodies to, with regard to the agreements whose commercial value was more than R.5 Crore. With the consent of the other parties to the Contract and agreement, the existing agreement and contract be suitably amended/altered as regard to dispute resolution mechanism so as to provide that the dispute be referred to the recognized Indian Arbitration Institutes, utilizing recommended arbitration clause, in substitution of existing clause.
> .. .. ..

(j) The fact is that this provision of dispute resolution is still surviving. Therefore, the Respondent is duty bound to apply the Policy decision on the dispute resolution clause."

MSRDC's case:-

23. In both the petitions Shri Shankarrao Santu Jagtap, Executive Engineer of the MSRDC, has filed reply affidavits.

24. The opposition to the writ petitions in the reply affidavit is *interalia* of the petitions being utterly misconceived, frivolous and an abuse of the jurisdiction of this Court under Article 226 of the Constitution for the reasons namely; the reliefs claimed are of a nature to be claimed in a public interest litigation. It is contended that when the petitioner is claiming a relief for itself, it must show a legal injury caused to it and the corresponding right being infringed. It is contended that the petition does not contain any such assertion. A mandamus directing the MSDRC to enter into an arbitration agreement cannot be issued by the Court. The petitioner, when contends that there is an arbitration clause in the agreement which has come to an end, certainly a writ petition seeking such relief is not maintainable. This more so when the agreement in question between the petitioner and the MSRDC, in both the cases has expired by efflux of time. It is

next contended that the State Government's policy would certainly not apply to the past contracts, and if it applies, it would apply only to the existing or future contracts. This apart, the said policy is only directory and the corporations and entities like the MSRDC are at liberty to take appropriate commercial decisions. The petitioner had never approached the MSRDC during the subsistence of the contract/ agreement to seek a modification of the agreement to include an arbitration agreement.

25. The reply affidavits also comment on the terms and conditions of the agreements and the consequent demand as made by the MSRDC on the petitioner, on the revenue sharing. In this context, it is contended that petitioner had already invoked the dispute resolution mechanism contained in clause 36 of the contract. In this regard the petitioner had also sought a hearing before the Vice-Chairman and the Managing Director (for short the "**VC & MD**") of the MSRDC (as per clause 36) which came to be granted to the petitioner on 8 March 2018. Upon consideration of the petitioner's say the VC & MD observed that MSRDC constituted a Committee (comprising of legal, accounts and engineering department personnel) to consider the objections of the petitioner, the committee had also gone into all the issues as raised by the petitioner. The VC & MD concluded that the objections of the

petitioner were not valid and ultimately by an order dated 18 September 2018 directed the petitioner to immediately pay the revenue share alongwith interest thereon to the MSRDC. The petitioner however failed to make such payment to the MSRDC. The MSRDC consequently by its letter dated 17 March 2020 called upon the petitioner to pay Rs.25,05,44,219/- as on 31 December 2019 to the MSRDC.

26. The MSRDC has contended that there is no arbitration agreement between the MSRDC and the petitioner, qua the agreements in question. The petitioner fully acknowledging this position nonetheless had sought reference of the disputes to arbitration which came to be rejected by MSRDC. It is contended that the writ petitions are thoroughly misconceived in as much as arbitration is a voluntary exercise which requires consent of the parties to be bound by the decision of the arbitral tribunal. It is contended in the present context, it was MSRDC's discretion whether to agree for arbitration for redressal of the MSRDC's claim. It is contended that it is settled law that the High Court would not issue a writ of mandamus in regard to an issue which is plainly the subject matter of the voluntary desire and will of the contracting parties. It is contended that the petitioner does not

have any right, either contractual or statutory, to force the MSRDC to raise its claim against the petitioner only in arbitration proceedings.

27. It is next contended by the MSRDC that the petitioner's case based on the State Government policy to have an "institutional arbitration" is completely misplaced. It is contended that the policy itself is not mandatory and is directory in nature. It is contended that in any case, as per the said policy, all existing contracts qualifying the criteria as prescribed in the Government Resolution are required to be suitably amended only after obtaining consent of the other parties, to include the model/standard arbitration clause. It is stated that the policy eschews ad-hoc arbitration and mandates that disputes in all the cases as may be provided in the policy shall be referred to institutional arbitration at the recognized arbitration centre for which the MCIA has been recognised as an arbitration centre. It is contended that the policy does not mandate any resort to institutional arbitration in cases where the contract stands determined. MSRDC says that in the present cases, the agreements stood determined by efflux of time and the toll plazas were handed over by the petitioner to the contractor appointed by the MSRDC on the said date. It is thus contended that the policy does not apply to the contracts which have come to an end, as the policy itself

came into force on 13 October 2016. This apart at no point of time during the subsistence of the said agreement, did the petitioner ever request the MSRDC to amend the said agreement in order to include a suitable arbitration clause. The MSRDC is not obliged to agree for any arbitration. It is next contended that the issue of the MSRDC entering into an arbitration agreement with the petitioner is purely a contractual issue.

28. It is contended by the MSRDC that it is settled law that this Court in exercise of its jurisdiction under Article 226 of the Constitution would not interfere in contractual matters. It is contended that in any event clause 36 of the contract as referred by the petitioner does not constitute an arbitration agreement under Section 7 of the Arbitration and Conciliation Act, 1996. A relief as prayed in the petition is certainly a relief to alter the agreement/contract which tantamounts to inviting the Court's interference in contractual matters. It is contended that in the first petition ex-facie prayer clauses (a) and (b) are contrary to each other. On one hand, in prayer (a) the petitioner seeks an order directing the MSRDC to take recourse to institutional arbitration purportedly invoking the said State policy. On the other hand, prayer clause (b) has the effect of directing MSRDC to adopt an arbitration

before the VC & MD of the MSRDC, which is contrary to the policy as also to the Arbitration and Conciliation Act, 1996, hence, both the prayers as made by the petitioner are not maintainable.

29. MSRDC says that it is clear from the facts that the petitioners case is not of any claim it has against the MSRDC but possibly on a claim which the MSRDC is making against the petitioner for amounts recoverable on the revenue sharing. Hence, the writ petition does not disclose any cause of action for the petitioner even to invoke arbitration much less file this petition. The petitioner therefore has neither filed any legal proceeding against the MSRDC, nor disclosed any claim against the MSRDC requiring arbitration. It is next contended that if it is the petitioner's contention that clause 36 of the contract/agreement (supra) is required to be construed as an arbitration agreement, then there was no question of filing these writ petitions seeking directions to amend the contract/agreement between the parties to provide for arbitration. The remedy of the petitioner in that case was to adopt appropriate proceedings under the Arbitration and Conciliation Act, 1996. It is contended that in any event the dispute resolution procedure provided in clause 36 of the agreement is already exhausted by the petitioner. The petitioner had invoked clause 36 and participated in a

hearing before the VC & MD and even in the meetings of the committee (of legal, accounts and engineering department of the MSRDC), formed to discuss and resolve the issues of calculation of revenue share as per the VC & MD's directions. This culminated into a decision/order dated 18 September 2018 of the VC & MD. If the petitioner was dissatisfied by the said decision of the VC & MD, the remedy for the petitioner was to take recourse to appropriate proceedings. After exhausting the remedy under the said clause under the agreement, it was not open for the petitioner to approach this court in the present proceedings as also to contend that clause 36 is an arbitration agreement. Accordingly, it is prayed that for these reasons, the petition deserves to be dismissed with costs.

30. Shri. Shankarrao Jagtap in his reply affidavit filed in the second petition, has raised similar contentions *inter-alia* stating that it is the MSRDC who by its letter dated 2 December 2017, had called upon the petitioner to pay Rs.58.76 Crores along with interest from 22 August 2016. It is MSRDC's case that the VC & MD were called upon by the petitioner to resolve the issues in regard to the MSRDC's demand as agreed in clause 39 of the offer document. It is contended that this request was acted upon by the VC & MD by granting a hearing to the

petitioner on the issues of methodology for calculation pertaining to revenue share. The VC & MD finally passed an order directing the petitioner to immediately pay the revenue share along with interest thereon to the MSRDC. The petitioner failed to make payment of the requisite amount. It is contended that it is MSRDC which has a claim of Rs.82,79,93,261.00 against the petitioner towards unpaid toll revenue share in terms of clause 28.4 of the offer document for which a demand was raised on the petitioner again on 20 January 2020. The bank guarantees were also encashed by the MSRDC. There is no question of any arbitration between the parties as there is no such agreement between the MSRDC and the petitioner. Despite this clear position the petitioner called upon the MSRDC to refer the dispute to arbitration, which was rightly rejected by the MSRDC by its letter dated 17 January 2019.

31. It is contended that the petitioner's case is purely on the basis of the Government policy dated 13 October 2016 which itself is wholly inapplicable as in this case the agreement stood terminated by efflux of time on 26 August 2016 and the toll plazas were also handed over by the petitioner to the new contractor M/s. Sahakar Global Ltd. It is contended that State's policy is dated 13 October i.e. after the

contract between the MSRDC and the petitioner / contractor having come to an end on 22 August 2016. It is contended that the policy does not apply to determined contracts hence prayers for a writ of this Court to be issued to provide for arbitration are totally untenable. Further contents of the affidavit are similar to the contentions as urged by the MSRDC in the first petition and thus are not required to be repeated.

32. On the above pleadings, we have heard Dr.Abhishek Manu Singhvi, learned Senior Counsel for the petitioner and Dr.Milind Sathe, learned Senior Counsel for the MSRDC.

Submissions on behalf of the petitioner:-

33. Dr. Singhvi would submit that the MSRDC is not correct in its contention that the policy as contained in the Government Resolution dated 13 October 2016 providing for reference of disputes to institutional arbitration would not be applicable to the agreements in question. According to him the State's policy clearly envisages that the State Government and/or its instrumentalities make a provision for institutional arbitration, in contracts entered with private parties. Such stipulation becomes wholly applicable to the agreements in question

entered by the MSRDC with the petitioners. It is hence submitted the reason as set out by the MSRDC, not agreeing for an institutional arbitration is illusory.

34. It is next submitted that it is obligatory for the MSRDC to implement the State policy even for those contracts which stood terminated by efflux of time when the petitioner itself is ready ad willing for arbitration. There is no question of the MSRDC contending, that it has a discretion not to opt for arbitration as a dispute resolution mechanism, once it is made mandatory by the said Government notification, to refer disputes to arbitration under the institutional mechanism.

35. The petitioner is entitled to seek implementation and effectuation of the State policy unless the policy was hit by any of the principles as laid down by the Supreme Court in Tata Cellular. A larger and holistic view point is required to be taken, as policy is not to cover individual cases, but is required to be applied in all appropriate cases. Both these cases are appropriate cases for the policy to be implemented and the disputes to be referred for institutional arbitration. There is no strong comprehensive reason not to refer the dispute to arbitration.

The MSRDC has no answer to any of these issues as raised by the petitioner.

36. The MSRDC ought to remove the disparity in contracts by uniformly applying the State policy providing for institutional arbitration. The State policy is mandatory in nature which is required to be applied even to contracts which stood determined by efflux of time.

37. It is submitted that clause 39 of the agreement between the parties in the first petition is required to be recognized as an arbitration agreement, which would survive even after the contractual period has come to an end. This for the reason that an arbitration agreement is an independent agreement and survives even after the contract has come to an end.

38. In support of the above submissions, reliance is placed on the decisions of the Supreme Court in (i) Branch Manager, Magma Leasing & Finance Ltd. & Anr. Vs. Potluri Madhavilata & Anr.[2], (ii) Reva Electric Car Company Pvt.Ltd. Vs. Green Mobil[3], (iii) Today Homes &

2 (2009) 10 Supreme Court Cases 103 (para 13 & 14)
3 (2012) 2 Supreme Court Cases 93 (paras 54, 55)

Infrastructure Pvt.Ltd. Vs. Ludhiana Improvement Trust & Anr.[4], (iv) Home Secretary, U.T. of Cbhandigarh & Anr. Vs. Darshjit Singh Grewal & Ors.[5], (v) Raja Shri.Shivrai Pratishthan Vs. State of Maharashtra & Ors.[6], (vi) Rameshwar Prasad Vs. Managing Director, U.P. Rajkiya Nirman Nigam Ltd. & Ors.[7] .

Submissions on behalf of the MSRDC:-

39. Dr.Sathe, would submit that the petitioners admittedly have no claim against the respondents .He submits that till the filing of present petition , no claim was raised by the petitioners against the MSRDC, as pointed out by the MSRDC in paragraph 12 of its reply. He submits that the toll collection period qua the agreement in the first case was between 6 February 2014 to 1 February 2017 which has long expired. It is submitted that during the contract period, there was no request by the petitioner for the contract to be altered to provide for arbitration as a dispute resolution mechanism. It is next submitted that the policy of the State Government in the notification dated 13 October 2016 is discretionary at the hands of the contracting parties qua the contracts which have come to an end and not mandatory as suggested

4 (2014) 5 Supreme Court Cases 68 (para 14)
5 (1993) 4 Supreme Court Cases 25 (para 14)
6 (2008) 10 Supreme Court Cases 799 (para 17)
7 (1999) 8 Supreme Court Cases 381

on behalf of the petitioner. According to Dr Sathe, the policy itself contemplates that in respect of existing agreement/contracts, only with the consent of the parties the contract can be suitably amended/ altered to provide for dispute resolution mechanism, so as to refer the disputes to Indian Arbitration Institutes. Hence it cannot be a subject matter of a direction of this Court under Article 226 of the Constitution.

40. It is submitted that the petitioner cannot force the MSRDC to consent for arbitration. The instance as shown by the petitioners that the MSRDC has provided for an arbitration clause in a toll collection contract at the five Mumbai entry points, can hardly assist the petitioner, as the same is a distinct contract, for which the contract period is upto the year 2026. Such a comparison between a contract which has come to an end, and a subsisting contract can never be made. Dr. Sathe has refereed to various contentions of the MSRDC as exhaustively dealt in reply affidavit. It is accordingly submitted that the petitions are is per se not maintainable and deserve to be dismissed.

41. Dr.Singhvi along with Mr.Datta have made submissions in rejoinder. It is submitted that the MSRDC has no answer to the issues on law as urged on behalf of the petitioner. It is submitted that the

contentions as urged on behalf of the MSRDC that the contracts in both the cases have determined by efflux of time are untenable as the arbitration agreements survive even after the expiry of contract. It is submitted that the policy notification dated 13 October 2016 is issued to bring about a uniform regime for resolution of disputes. It is submitted that the contentions of the MSRDC are wholly contrary to the clear intent of the policy. There cannot be a discriminatory and selective policy when it comes to the State entering into contract on the dispute resolution mechanism. Once a policy is formulated, it is required to be given effect in all contracts existing or otherwise. The legislative policy as contained in the enactments like Arbitration and Conciliation Act 1996, Code of Civil Procedure, as also the notification dated 13 October 2016 leans heavily in favour of arbitration rather than compelling a party to approach the Civil Court. A larger holistic view is required to be taken.

42. In rejoinder a case is sought to be argued that MSRDC's contention that the petitioner has no claim against the respondent is untenable for the reason that there is a specific claim made by the petitioner namely that the amount demanded by the respondent on the revenue sharing is contrary to the agreement and hence illegal. It is for

this reason that the petitioner has demanded arbitration as per the policy decision and in terms of their specific demand qua the contracts, subject matter of the present proceedings. There is hence a valid claim of each of the petitioner that said demand ought to be struck down and damages be awarded to the petitioner for breach of contract. These are the disputes which are required to be adjudicated by referring the disputes to institutional arbitration as per the State policy as contained in the said notification.

Discussion and Conclusion

43. We may at the outset note some of the admitted facets of the petitioner's case. The contracts in question in both the cases were concluded contracts, they stand fully executed. The contract period in the first case came to an end on 1 February 2017 and in the second case came to an end on 22 August 2016. During the subsistence of both these contracts, the petitioners never insisted for any amendment and/or modification of the terms of the contract so as to request the MSRDC to provide for arbitration as a dispute resolution mechanism. It is also an admitted position that both the petitioners, by itself have not raised any claim against MSRDC under these contracts. Hence, concededly the petitioners have no claim whatsoever against the

MSRDC.

44. It is further an admitted position that the MSRDC acting under the contractual terms post the contract period, has raised an issue in regard to revenue sharing on the basis of traffic figures as collected by it, by appointing an expert agency and considering the figures which the petitioners-contractors had furnished. On the basis of such materials MSRDC has raised a demand on both these petitioners. Both the contracts provided for dispute resolution mechanism under which the VC &MD was the authority who would consider any such issue arising between the parties, in a manner as agreed, and take a decision which is to attain finality. In both these contracts, the petitioners invoked the said mechanism in regard to the amounts as demanded by the MSRDC, on the revenue sharing. As noted above the VC&MD appointed a committee of Legal, Accounts and Engineering Division and on the basis of the report of the committee, a demand was raised on the petitioners on the revenue sharing. It is thus evident, that it is the MSRDC which has a claim against the petitioners, for which MSRDC has not so far initiated proceedings as may be permissible under the contractual relations in which the parties stood. When the petitioners having no claim against the MSRDC approached the MSRDC

with a request that an arbitral tribunal be appointed to adjudicate any dispute, the MSRDC rejected the said request of the petitioners saying that the contracts do not provide for any arbitration agreement.

45. It is not the case of the petitioners that such a reply or communication of the MSRDC is alien to the contract, despite this, the petitioners pray that an arbitration mechanism now be provided, by taking recourse to the Government Policy as contained in the Notification dated 13 October 2016. Admittedly, such a request was completely falling outside the contractual conditions as agreed between the parties. In other words, it is a prayer of the petitioners that an additional condition in the contract be incorporated/ created under the orders of this Court, namely to make a provision for institutional arbitration between the parties, in respect of both these agreements and that too when these agreements stand determined by efflux of time. Such case of the petitioner is based on the following premise:-

(i) That the State Government has a policy in its notification dated 13 October 2016 to provide for institutional arbitration in the contracts which would be entered by the State Government and its agencies.

(ii) That Clause no.36.a (in the first petition) is an arbitration agreement between the parties and which ought to be given effect.

(iii) As regards the Second petition, only on the basis of the State Government Policy as contained in the Notification dated 13 October 2016 arbitration between the parties ought to be provided.

46. Before we proceed to examine the petitioners case, at the outset we may note that there is nothing shown to us, that under the respective agreements the parties have agreed to be bound by any future policy of the State government in this context. Nevertheless, to appreciate the petitioners case, it can be examined as to what is the policy of the State Government as contained in the notification dated 13 October 2016. The Government Notification dated 13 October 2016, in the introductory paragraph records that it is to reduce the expenditure on litigation and to have speedy resolution of disputes, the State Government in pursuance of the decision taken in the committee of Ministers, has approved an institutional arbitration policy as contained in Annexure A of the said Government Resolution. Annexure A provides for policy of arbitration as a preferred mode of dispute

resolution. The policy also refers to 246th Report of the Law Commission of India, in regard to the slow speed of institutional arbitration in India, except its working in the Delhi High Court International Arbitration Centre (since 2009), the Punjab and Haryana High Court Arbitration Centre (since 2014) and the Indian Council of Arbitration in co-ordination with FICCI and Nani Palkhiwala Arbitration Centre, in Chennai. It speaks of establishment of an institutional arbitration centre at Mumbai. Under the heading 'Policy Initiatives' following are the relevant clauses which are required to be noted (as translated by the official translator of this Court, from the vernacular policy notification) :-

" Policy Initiatives

One	Initially the Government of Maharashtra, as a part of its above mentioned Policy, has proposed to give impetus to the institutional arbitration.
Two	There appears large variety in the machinery, included to resolve the disputes in various contracts, implemented by or on behalf of Govt. of Maharashtra. In one matter, there is a procedure to give award by the Govt. Officers whereas in another matter, the Govt. Officers are the arbitrators. In few matters, the authority giving award and the arbitrator both are the Government Officers only. In some other matters, as per the provisions of Arbitration and Conciliation Act, 1996, there is a standard arbitration clause to resolve the disputes. Therefore, by removing this disparity, a uniform system to resolve the disputes through Arbitration, has been proposed.
Three	In all the Agreements, the commercial value of which is

	Rs.5,00,00,000/- (Rupees five crores) or more than that, i.e. in contracts and Agreements to be entered into by the Governors or on their behalf as well as on behalf of State Government companies and other Government Corporations and Government Undertakings, the institutional arbitration clause shall be included due to which the dispute may be referred to the renown Indian Arbitration Institution. (Specimen clause Appendix A – 1).
Four	In the contracts and Agreements which are in existence at present, appropriate amendments may be carried out in the existing clauses in respect of resolving the disputes, with the consent of other litigants or instead of those clauses, the aforesaid recommended clause shall be included so that the dispute may be referred to the recognized Arbitration Institution and accordingly, appropriate changes/amendments shall be carried out in the provisions in respect of dispute resolving system, in the existing contracts and agreements.
Five	In the matters in which arbitration has started or is going to start, even in such matters, the litigants may resort to the option of proposed institutional arbitration system."

47. The policy initiatives are therefore aimed to promote institutional arbitration and to provide for a uniform regime for resolution of disputes through arbitration so that a standard institutional arbitration clause be provided in the contracts entered by the State Government or its bodies where commercial value of the contract is Rs.5 crores. However, what is significant is as to what is provided in clause (iv)(supra) that only with the consent of the parties to the contract/agreement, the existing agreement and / or contract can be suitably amended or altered to provide for a dispute resolution mechanism for referring the disputes to an Indian Arbitration Institute.

It is thus not a policy of the State Government that it would mandate compulsory imposition of an arbitration agreement, qua the existing contracts so as to automatically amend such contracts as entered between the parties, by such executive fiat. This cannot be done in law. In our opinion, the contracting freedom and the free consent of the parties, to have mutually agreed terms in a contract is in no manner disturbed, when this policy recognizes that only with the consent of the other parties namely the contractors the existing agreement can be changed. Admittedly no initiative has been taken by the MSRDC to demand arbitration.

48. The petitioner, however, wants us to read clause (iv) of the policy initiatives to mean that institutional arbitration perforce has become binding and mandatory qua the contracts in question when the "other parties to the contract" namely the contractor (petitioners) themselves have agreed for providing for arbitration as mode of dispute resolution. We are afraid that this contention as urged on behalf of the petitioner not only militates against the basic tenets of a valid and a legal contract well recognized not only under the Indian Contract Act but also under the Arbitration and Conciliation Act.

49. The fundamental requirements of a valid contract, is the common intention of the contracting parties and the autonomy to have such terms and conditions as intended by the parties so as to create binding legal obligations. The essence is to have an accord and unanimity on the terms and conditions so as to have an agreement. Blacks law Dictionary (Eighth Edition) would describe an agreement as under:-

> "**Black's Law Dictionary, Eighth Edition pg.74**
>
> "**agreement.** 1. A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons. (Cases:Contracts 1.C.J.S. Contracts## 2-3, 9, 12) 2. The parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance. UCC # 1-201(b)(3).
> (Cases:Sales – 33. C.J.S. Sales # 43.)
> ……
> "An agreement, as the courts have said, 'is nothing more than a manifestation of mutual assent' by two or more legally competent persons to one another. Agreement is in some respects a broader term than contract, or even than bargain or promise. It covers executed sales, gifts, and other transfers of property." Samuel Williston. A Treaties on the Law of Contract # 2. at 6 (Walter H.E.Jaeger ed. 3D ed.1957)."

50. Section 2(h) of the Indian Contract Act 1872 defines contract (NB) *"an agreement enforceable by law is a contract."* Hence a contract as recognized by law necessarily needs to have terms and conditions as incorporated by mutual consent of parties. None of the parties can foist a term to which the other party is not agreeable, such a situation

would not bring about an enforceable legal obligation. These principles are well recognized under various sections as contained in Chapter I of the Indian Contract Act 1872. Thus, when an agreement by free consent is entered between the parties, then subsequently to incorporate a specific new term in such a existing contract, can only be done on the principles of mutuality and not otherwise. The logical corollary being, no party to a contract can superimpose on the other contracting party a condition not agreeable to such party. This would also be true, when it is an arbitration being foisted by one party on the other, on whatever premise.

51. The second facet which is most vital and which would go to the root of the matter is as to what is an 'arbitration agreement' as the Arbitration and Conciliation Act,1996 (for short 'the **ACA**') would define and recognize . Section 7 of the ACA defines an arbitration agreement to mean :-

> "7. Arbitration agreement.- (1) In this Part, "arbitration agreement" means an agreement **by the parties** to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
> (3) An arbitration agreement shall be in writing.
> (4) An arbitration agreement is in writing if it is contained

> in-
> (a) a document signed by the parties;
> (b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or
> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."
>
> (emphasis supplied)

52. We may thus observe that even on first principles unless the contracting parties agree in a manner as recognized by Section 7 of the ACA to refer the disputes arising between them to arbitration, an arbitration agreement between the parties would not come into existence. The essence being arbitration is a consensual remedy. The petitioner's case if tested on the above principles, certainly there is no arbitration agreement between the parties to refer the disputes to be adjudicated in an arbitration.

53. Being well conscious that there is no arbitration agreement between the parties the petitioners appear to have advisedly not taken recourse to the provisions of Section 11 of the ACA seeking appointment of an arbitrator if they were of the opinion that some dispute existed between the parties.

54. The petitioners have however thought of the present novel method to take recourse to the public law remedy to seek a relief so as bring about an arbitration agreement between the parties, purportedly invoking the State's policy decision as contained in the notification dated 13th October 2016. As noted above the policy itself is directory which recognizes the requirement of law, that is qua the existing contracts the parties need to consent to amend the contract, as provided for in paragraph four (supra). In our opinion, it would be too adventurous for the petitioner to expect the Writ Court to compel the MSRDC to enter into an arbitration agreement, given the State of law.

55. When a party to invokes the jurisdiction of the court under article 226 of the Constitution it is taking recourse to a public law remedy. A writ would not be issued by the court to incorporate and / or introduce a new term and condition in a contract executed between the parties. The petitioner even at the stage of entering into a contract could not have sought interference of this Court to adjudicate as to how the terms and conditions of the contract would be framed. It is settled that the State has a free hand in setting the terms of a tender and a contract to be brought about. A judicial review as to what should be

the terms and conditions of an agreement, is certainly not the jurisdiction of the Court and that too the extraordinary jurisdiction under Article 226 of the Constitution. If such interference is made, it would amount to this Court sitting in appeal over the contractual freedom exercised by the MSRDC. Further more the Court by exercising writ jurisdiction cannot re-write or vary the terms and conditions of the contract. Once the contract was entered between the parties, the parties being governed by the terms and conditions of the contract, would be the normal rule. There is nothing exceptional in the present case which would require a judicial review of the contractual position taken by the parties. This, more particularly when the parties have acted under the contract and the contractual period having already come to an end. There is no public law element involved in the present case so as to exercise the powers of judicial review in the present proceedings. In our considered opinion, a writ petition under Article 226 of the Constitution in the present circumstances for the prayers as made in the petitions to provide for arbitration as a dispute resolution mechanism, is certainly not maintainable. This even assuming that the State Notification dated 13 October 2016 lays down a policy to provide institutional arbitration in cases where the State Government or its authorities enter into contracts for pubic works.

56. In the above context we may usefully refer to the decision of the Supreme Court in **Travancore Devaswom Board Versus Panchamy Pack (P.) Ltd.**[8]. In this case, the High Court in refusing to entertain a writ petition filed under Article 226 of the Constitution of India, on the ground that disputed facts were involved, however passed an order, referring the dispute between the parties to arbitration by appointing an arbitrator. In considering the challenge to the said direction of the High Court the Supreme Court held that when there was no arbitration agreement within the meaning of Section 7(4) of the ACA and it was not correct for the High Court to pass any order under Article 226 of the Constitution of India to refer the dispute for arbitration. The following observations as made by the Supreme Court are required to be noted:-

> "6. We are unable to accede to any of the three submissions made by the respondent. The Arbitration and Conciliation Act, 1996, clearly provides that the arbitration agreement must be an agreement which should be in writing [see Section 7(4)]. In this case, there was no agreement at all, quite apart from the fact that there was no writing to this effect. The High Court has not in the impugned order recorded any consent as has been contended by the respondent. We are not prepared to act on any basis other than that expressed by the High Court itself."

8 (2004) 13 Supreme Court Cases 510

57. A full Bench of the Kerala High Court in ***Southern Structurals Ltd. Vs. Kerala State Electricity Board***[9] declared that a decision of the Division Bench in **Koshy Varghese V. Hindustan Paper Corporation Ltd.**[10] wherein the Division Bench held that a Court sitting under Article 226 of the Constitution can direct the parties to go for arbitration under the ACA even in the absence of an arbitration agreement between the parties, did not lay down the correct law. It was held that the Court cannot compel a party to agree for arbitration.

58. The parties cannot be forced to arbitrate by issuance of a writ of this Court as this also would not only be contrary to the entire concept of what is conceived as an arbitration agreement as defined under Section 7 of the ACA but also as noted above it would be in the teeth of Section 10 of the Indian Contract Act which requires free consent of the parties to have a legal and valid contract. It cannot be overlooked that lack of valid arbitration agreement is one of the basic grounds available to the parties for setting aside an arbitral award. Thus to foist an arbitration agreement on a party is nothing short of imposing an illegality.

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9 2007 SCC OnLine Ker 181
10 2000(2) KLT 329

59. Even otherwise, as to whether a public law remedy, would be available to the petitioners when the nature of the contract between the MSRDC and the petitioners is non statutory, the position in law is no more *res integra*. In **Bareli Development Authority vs. Ajay Pal Singh** , the Supreme Court has recognized as a settled position in law that when a contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India. The observation in para. 20 and 21 of the report are required to be noted which read thus:

> "20. This finding, in our view, is not correct in the light of the facts and circumstances of this case because in Ramana Dayaram Shetty's case there was no concluded contract as in this case. Even conceding that the BDA has the trappings of a State or would be comprehended in 'other authority' for the purpose of Article 12 of the Constitution, while determining price of the houses/flats constructed by it and the rate of monthly instalments to be paid, the 'authority' or its agent after entering into the field of ordinary contract acts purely in its executive capacity. **Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter-se. In this sphere, they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. BDA in this case) in the said contractual field.**
>
> **21. There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple:** Radhakrishna Agarwal V. State of

Bihar (1977)3 SCR 249; (AIR 1977 SC 1496), Premji Bhai Parmar Vs. Delhi Development Authority (1980)2 SCR 704: (AIR 1980 SC 738) and D.F.O. V. Biswanath Tea Company Ltd. (1981)3 SCR 662: (AIR 1981 SC 1368)."

(emphasis supplied)

60. The next contention as urged on behalf of the petitioners is referring to the provisions of Section 89 of the Civil Procedure Code to the effect, that it would be the duty of the Court to recognize and promote alternative dispute resolution mechanism. This contention of the petitioners in the present facts is totally untenable. Section 89 of the Code of Civil Procedure is itself premised on free consent of the parties agreeing to deviate from the course of a suit and take recourse to alternative methods of dispute resolution. This is clear from the wordings of Section 89 when it provides "*Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties*,.. .. ..." The Court cannot force a party to the proceedings to compulsory take recourse to alternative dispute redressal mechanism. It is however always open to the contracting parties to agree and take recourse to the alternative modes of dispute redressal, as it cannot be overlooked that speedy resolution of commercial disputes is the need in present times. However it is certainly not open to the contracting parties to approach the writ court

in matters of commercial contracts and pray that an arbitration agreement be created between the parties and they be referred to arbitration. This would be against the fundamental principle and ethos on which an arbitration law is founded namely a clear agreement between the parties in writing, that the parties agree to refer disputes under the contract for arbitration.

61. We now refer to the decisions as relied on behalf of the petitioner. The first decision as relied is in the case of '**The Branch Manager, M/s. Magma Leasing &Finance Limited & Anr. v/s. Potluri Madhavilata & Anr** (supra), support the proposition that even if a contract has come to an end by its termination, an arbitration clause in the contract would not perish and would nonetheless survive for resolution of disputes arising "in respect of" or "with regard to" or "under the contract". There can be no dispute on the proposition as laid down. However in the present facts, when there is no arbitration agreement between the parties in any legal and recognized form, we are afraid as to how this decision would assist the petitioner and that too to contend that the arbitration clause would survive after the contract has come to an end. In this case the Supreme Court was dealing with a dispute between the parties which had arisen under a

higher purchase agreement, which contained an arbitration agreement between the parties as contained in clause 22. The respondent-Potluri Madhavilata had approached the Civil Court in a civil suit, in which an objection was raised by the appellants under Section 8 of the ACA, to the maintainability of the suit in view of an arbitration agreement between the parties. The defence of the respondent /plaintiff- Potluri Madhavilata was to the effect that as the higher purchase agreement stood terminated, the arbitration agreement did not survive, hence the dispute cannot be referred to arbitration. The learned Civil Judge rejected the Magma's application, further challenge before the High Court was also failed. It is in this context the Court referring to the decision of the House of Lords in **Heyman and Anr v. Darwins Ltd.** and more particularly the observations of Viscount Simon, L.C. who concurred with the views expressed by Lord Dunedin in **Scott & Sons v. Del Sel**, (1923) S.C.(H.L.) 37, it was held that the arbitration agreement survives for the purposes of resolution of disputes even if performance of the contract had come to an end.

62. In deciding a Section 11 application filed under the ACA in **M/s. Reva Electric Car Co. P. Ltd. vs. M/s. Green Mobil** (supra) and in

another judgment in the case of **Today Homes and Infrastructure Pvt Ltd. Versus Ludhiana Improvement Trust and Anr** (supra) as relied on behalf of the petitioners a view similar as in **'The Branch Manager, M/s. Magma Leasing & Finance Limited & Anr. v/s. Potluri Madhavilata & Anr** (supra) was taken by the Supreme Court. These decisions hence would also not assist the petitioner.

63. The next decision as relied by the petitioner is in the case of **Home Secretary U.T. of Chandigarh & Anr. v/s. Darshjit Singh Grewal & Ors.** (supra) to canvass a proposition that the policy as contained in the State Government's notification dated 13 October 2016 having a general application was binding on the MSRDC. In this case, the Court was concerned with the guidelines issued by the Chandigarh Union Territory Administration to govern "Migration of students to various technical/professional colleges, titled as "*policy regarding migration to various technical/professional colleges under the control of Chandigarh Administration*". The Court examining the statutory framework namely the rules and regulations of the University and the guidelines issued by the Chandigarh Administration, in paragraph 14 of the decision observed that rules and regulations as referred were statutory and the policy guidelines were relatable to the

executive power of the Chandigarh Administration. It is in this context, the Court made the following observations:-

> "14. ..... It is axiomatic that having enunciated a policy of general application and having communicated to it all concerned including the Chandigarh engineering college, the Administration is bound by it. It can, of course, change the policy but until that is done, it is bound to adhere to it."

We are at a loss to discern, as to how these observations as relied on behalf of the petitioners would assist the petitioners in the present context, which is a contractual issue. The case of the petitioners in the present petitions is effectively to call upon this Court to provide for an arbitration between the parties by applying the said policy of the State Government, which is nothing short of the petitioner calling upon the Court to amend the agreements of the petitioners as entered with the MSRDC. Similarly in **Raja Shri Shivrai Pratishthan vs. State of Maharashtra & Ors.** (supra), the challenge before the Supreme Court arose from a decision of the High Court which had dismissed a writ petition filed by the appellants questioning Government Resolution dated 20 April 2002, whereby names of the appellants were excluded from the list of institutions selected for running Vruddhashrams on non-grant-aid basis. A policy decision was taken by the Government of Maharashtra to establish homes for senior citizens under the Matoshree Vruddhashram Scheme. In 1995, rules came to be framed for providing

grant-in-aid to recognized Vruddhashrams. After six years, the State Government reviewed its decision and issued a fresh Resolution dated 3 December, 2001 for conducting Vruddhashrams through private voluntary institutions on permanent non-grant-aid basis. Pursuant thereto, advertisements were issued by the Director, Social Welfare by inviting proposals for conducting Vruddhashrams on non-grant-aid basis. The appellant was one of the applicants under the said advertisement. The private respondents submitted applications for being selected for running Vruddhashrams. Thereafter by a Resolution dated 20 April, 2002, the government notified listing of institutions selected for conducting Vruddhashrams on non-grant-aid basis. The names of the appellants did not figure in that list. Instead, the private respondents were shown as the institutions selected for running Vruddhashrams at Pune and Kolhapur respectively. The petitioner in these circumstances challenged the Government Resolution dated 20 April, 2002 to contend that their non-selection for running Vruddhashrams on non-grant-aid basis was wholly arbitrary. The appellants' challenge before the High Court failed, as the High Court held that the allotment of Vruddhashrams on grant-in-aid basis did not create any vested right in favour of the appellants and that the appellants cannot complain against the revised policy decision or claim

that they should have been heard before rejection of their applications. It is in this context the Supreme Court in paragraph 17 made the following observations:

> "17. ..... Once the Government laid down the policy for selection, the same was binding on all its functionaries including the Director, Social Welfare and the applications of the appellants could not have been indirectly rejected without any rhyme or reason."

It is difficult for us to accept petitioners reliance on this decision in the present facts. This decision in any case does not involve any contractual relations between the parties as in the present case.

64. The petitioners reliance on the decision of the Supreme Court in **Rameshwar Prasad V/s. Managing Director of U.P. Rajkiya Nirman Nigam Ltd. & Ors.** (supra), in our opinion, is also misplaced. This was a decision in the context of an employee on deputation, whether would have any right to be absorbed. The Court held that an employee on deputation has no right to be absorbed in service when he was working on deputation unless there is a contrary provision in the statutory rules. It was held that it is true that whether the deputationists should be absorbed in service or not, is a policy matter, but at the same time, once the policy is accepted and rules are framed for such absorption, before rejecting the application, there must be

justifiable reasons. It is in this context the following observations in paragraph 17 as relied on behalf of the petitioner came to be made:-

> "17. In our view, it is true that whether the deputationists should be absorbed in service or not is a policy matter, but at the same time, once the policy is accepted and rules are framed for such absorption, before rejecting the application, there must be justifiable reasons. ……."

65. To sum up, the above discussion would lead us to conclude with certitude that the petitioners are thoroughly ill-advised to file the present proceedings to seek application of the State Government Policy to provide for an institutional arbitration qua the agreements executed by them with the MSRDC. It also equally surprising as to how the petitioner in the first petition can take a contradictory stand that clause 36(a) is an arbitration clause.

66. Before parting we would be failing in our duty if we do not record what our judicial conscience would say. We have noted that the reliefs as prayed for were totally not maintainable. It appears to us that the purpose for which these proceedings are instituted is not innocuous. There seems to be some oblique purpose. The petitioners are experts in their commercial field, they are certainly not those who would be deprived of a legal advice so as to be not oblivious of their contractual

limitations. Nonetheless the petitioners with all resources at their disposal have taken recourse to the present proceedings and in doing so have imposed a toll on the already burdened docket and precious public time of the Court, which could have been utilised for many deserving cases.

67. For the above reasons the writ petitions need to fail, they are accordingly dismissed with cost of Rs.5 Lakhs each to be deposited with the Tata Cancer Hospital within two weeks from today.

68. This judgment and order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or e-mail of a digitally signed copy of this order.

G.S.KULKARNI, J. **CHIEF JUSTICE**